

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAVID RICHBOW,

Defendant-Appellee.

UNPUBLISHED

March 5, 2002

No. 233047

Wayne Circuit Court

LC No. 00-013451

Before: White, P.J., Whitbeck, C.J., and Holbrook, Jr., J.

PER CURIAM.

The prosecutor charged defendant David Richbow in the district court with possession with intent to deliver more than 50, but less than 225 grams of cocaine.¹ Richbow waived his right to a preliminary examination in writing, allowing the district court to bind him over for trial. In the circuit court, Richbow moved to quash the search warrant that produced the evidence leading to his arrest. The circuit court granted the motion and dismissed the case. The prosecutor appeals as of right. We reverse and remand.

I. The Affidavit

According to the affidavit attached to the search warrant, Police Officer John Hall, the affiant, had been a member of the Detroit Police Department for eleven or twelve years, the last seven of which he had been assigned to a narcotics unit. Hall had received extensive, special training in drug-related law enforcement and investigation, and had worked “in numerous drug investigations both as a uniform[ed officer] and in an un[der]cover capacity.” In the next ten paragraphs, spanning two pages, Hall listed various conduct and habits he claimed were known to be associated with people in the narcotics business. For instance, Hall stated:

Drug traffickers maintain books, records, receipts, notes, ledgers and other papers relating to the procurement, distribution, storage, transportation of controlled substances, i.e., records showing the phone numbers and beeper numbers of customers, the amount of controlled substances “fronted” to various customers along with running totals of debts of customers. . . .

¹ MCL 333.7401(2)(a)(iii).

The lists of the items individuals involved with narcotics commonly keep were long and detailed, but this information was generic, none of it was alleged to have come from the investigation regarding Richbow.

The affidavit first mentioned information concerning Richbow on the third page. Hall indicated that Richbow had three previous narcotics convictions and that he, Hall, had been working with three confidential informants, whom he called sources of information or SOIs:

Affiant has received information over the past (2) years as to David Richbow, AKA "DA DA". SOI #1 advised affiant over the course of (2) years that "DA DA" is selling large quantities of cocaine and marijuana in the area of 7 mile/Van Dyke. SOI #1 stated she/he has observed "DA DA" sell cocaine to persons on the street and at numerous houses in the area. SOI #1 contacted affiant less than (4) weeks ago and stated "DA DA" was observed with marijuana by SOI #1, SOI #1 stated to affiant that "DA DA" was selling marijuana to a [sic] unwitting person known by the SOI on the street, the SOI stated "DA DA" advised the SOI that he had narcotics for sale, either cocaine or marijuana.

Affiant in the past year received information from SOI #2 via PO [police officer] Turklay. SOI #2 provided and [sic] address of 12085 Lansdowne stating this is the home of "DA DA". SOI #2 has advised that she/he observed "DA DA" with cocaine and marijuana in the past. SOI#2 advised PO Turklay that "DA DA" is still selling narcotics, SOI #2 has observed "DA DA" with known customers in the past (2) months.

Affiant is receiving information from SOI #3 regarding "DA DA". SOI #3 has advised affiant that she/he knows "DA DA" and that he lives somewhere on Lansdowne street [sic] near Morang [sic]. SOI #3 states that within the past (48) hours she/he had a conversation with "DA DA", "DA DA" stated he had narcotics for sale and to contact him if the SOI need[ed] anything.

Hall explained why he believed these three SOIs to be credible and reliable. SOI #1 had worked with the police previously, lending help that had resulted in police seizure of more than five hundred grams of cocaine and thousands of dollars. SOI # 2 evidently had not worked with the police previously, but SOI #1 and another police officer were allegedly able to verify SOI #2's credibility and reliability. SOI #3 also apparently had not worked with the police previously, but, according to the affidavit, police officers were able to confirm SOI #3's observations.

The affidavit also detailed the steps the officers took to confirm their suspicion that Richbow was dealing drugs from his home. On the day before drafting the affidavit for the warrant, Hall and another officer conducted what is known as a "trash pull." They observed trash bags left at the curb near Richbow's house for collection. From these bags the officers retrieved three items. The first two items, a letter and a telegram, were both addressed to Richbow. The third item was "a clear plastic liner" attached to torn duct tape. In Hall's opinion as an officer with seven years' experience in narcotics law enforcement, he believed that this plastic and tape was "a Kilo wrapper for cocaine." The affidavit did not indicate whether the police used any sort of test to determine whether this plastic had drug residue, but Hall found out that Richbow used the address on Lansdowne Street on his driver's license, that he had been

arrested at least twice for narcotics offenses and twice for weapons offenses, and that he had an outstanding warrant for his arrest for assault.

In concluding the affidavit, Hall averred:

Affiant believes that with the past and recent information provided by (3) different SOI's who in affiants experience do not know each other, coupled with affiants evidence from a trash pull at 12085 Lansdowne, also with David Richbow's past history, David Richbow is continuing his narcotics trafficking and is using the address of 12085 Lansdowne to store his cocaine and marijuana, possibly his profits from said narcotic sales.

The search warrant allowed the officers to search the entire premises at 12085 Lansdowne Street and to collect dozens of items ostensibly related to the drug trade.

II. Suppression

Richbow moved to quash the search warrant and suppress evidence gathered pursuant to it, arguing that the evidence in the affidavit was stale, there was no allegation of contraband ever being in the house at Lansdowne Street, nor had the SOIs claimed to have seen drugs on the premises, and that there was no evidence that Hall and the other officer found drug residue on anything in his trash. The prosecutor responded that the SOIs were credible and reliable, the police had corroborated much of their information, the evidence was not stale, and that the totality of the circumstances would have allowed a reasonably cautious person to conclude that there was a substantial basis for the magistrate's finding that there was probable cause to issue the warrant.

The circuit court first voiced its displeasure with what it perceived to be the boilerplate language in the first two pages of the affidavit. The circuit court informed the prosecutor that it had seen the same language in a number of other affidavits and that the prosecutor should warn the police officers that it made their affidavits look "suspicious." The circuit court indicated that it had no basis to believe that the three SOIs were credible and reliable because SOI #1, the only one with a history of helping law enforcement, did not provide any fresh evidence, and the other two SOIs had no record with the police, making their existence, reliability, and credibility, doubtful. The circuit court discounted the value of the trash pull, noting that the evidence consisted solely of innocuous materials; the letter and telegram merely tied Richbow to the house and the plastic was also commonly used to wrap flowers. Further, the police investigation into Richbow's background did not corroborate the information from SOIs # 2 and 3, and had no bearing on any criminal activities at his residence at the time Hall sought the warrant; the information Hall obtained merely demonstrated Richbow's address and that he had a criminal history. As the prosecutor conceded, a criminal history alone is insufficient to justify a search warrant. The circuit court attributed the magistrate's decision to authorize the warrant to the police practice of "padding" affidavits with so much useless information that the magistrates lacked adequate time to read and consider the affidavits fully. With a final admonition to the prosecutor to tell the police "to start putting in the truth, and stop – take out all this textbook junk," the circuit court summarized the basis for its decision to quash the warrant and dismiss the case:

[T]he reason it's gone is because the information that you get from SOI Number 1 is not sufficient with everything else that they're able to corroborate, because SOI 2 and 3 have absolutely no track record, cannot be determined to be reliable, and the little bit of corroboration that the officer gets by going in the trash dump is not sufficient.

On appeal, the prosecutor reiterates his argument that the information in the affidavit was adequate to issue the search warrant, making the circuit court's decision to suppress the warrant erroneous.

III. Standard Of Review

In *People v Russo*,² our Supreme Court articulated the highly deferential standard of review that applies to the magistrate's decision to issue a search warrant. "[A]ppellate scrutiny of a magistrate's decision involves neither de novo review nor application of an abuse of discretion standard. Rather, the preference for warrants . . . requires the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause."³

IV. Probable Cause

Recently, in *People v Ulman*,⁴ this Court explained at length the legal requirements that govern when a magistrate may issue a search warrant:

A magistrate may issue a search warrant only when it is supported by probable cause. MCL 780.651(1); MSA 28.1259(1)(1); *People v Sloan*, 450 Mich 160, 166-167; 538 NW2d 380 (1995).^[5] "Probable cause sufficient to support issuing a search warrant exists when all the facts and circumstances would lead a reasonable person to believe that the evidence of a crime or the contraband sought is in the place requested to be searched." *People v Brannon*, 194 Mich App 121, 132; 486 NW2d 83 (1992). "The magistrate's findings of reasonable or probable cause shall be based on all the facts related within the affidavit made before him or her." MCL 780.653; MSA 28.1259(3). When probable cause is averred in an affidavit, the affidavit must contain facts within the knowledge of the affiant rather than mere conclusions or beliefs. *Sloan, supra* at 168-169; *People v Cooper*, 166 Mich App 638, 652; 421 NW2d 177 (1987). However, the affiant's experience is relevant to the establishment of probable cause. *People v Darwich*, 226 Mich App 635, 639; 575 NW2d 44 (1997). Police officers are presumptively reliable; in addition, self-authenticating details establish reliability. *People v Powell*, 201 Mich App 516, 523; 506 NW2d 894 (1993) (Corrigan, J.). An

² *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992).

³ *Id.* at 603.

⁴ *People v Ulman*, 244 Mich App 500, 509-510; 625 NW2d 429 (2001).

⁵ Overruled on other grounds *People v Wager*, 460 Mich 118, 123-124; 594 NW2d 487 (1999).

independent police investigation that verifies information provided by an informant can also support issuance of a search warrant. *People v. Harris*, 191 Mich App 422, 425-426; 479 NW2d 6 (1991).

In fact, with respect to this last suggestion in *Ulman*, the statute governing search warrants anticipates that police officers will have to rely on confidential informants, and allows them to do so. MCL 780.653(b) expressly permits a magistrate to rely on statements in the affidavit that come from an “unnamed person” as long as the affidavit also includes “affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information *and* either that the unnamed person is credible *or* that the information is reliable.”⁶ Whether the informant had personal knowledge must be determined from the facts or information the informant provided, especially any particularized details, rather than the mere statement that the informant had personal knowledge.⁷ The informant’s history of giving accurate information to the police or, as *Ulman* indicated, the ability of the police to verify the informant’s tip through independent investigation both bear on whether the informant is credible or reliable.⁸

We have no quarrel with the circuit court’s comment that boilerplate language inserted into many affidavits has virtually no relevance to probable cause in a particular case. However, we conclude that the remaining material was sufficient to support the warrant.

Viewing the larger picture painted by the information in the affidavit, Hall had ongoing information about Richbow’s drug activities that began two years ago and continued within two days of the affidavit, including the personal knowledge of all three informants. SOI #1’s credibility and the reliability of his or her information was not in question given SOI #1’s history of helping the police. While SOI #1’s information concerning Richbow’s drug dealing was the most distant in time from when Hall sought the warrant, it provided a proper background for Hall’s suspicions regarding Richbow. Though not dispositive, the magistrate also could give some credence to SOIs #2 and 3 because the three informants did not know each other, yet they each consistently related Richbow’s street name and the nature of his drug dealing activities.

We also disagree that the trash pull in this case yielded no valuable evidence. As the circuit court intimated, individuals may have completely innocuous and lawful reasons for possessing items like the plastic and tape that the police found in Richbow’s trash. However, the magistrate was also entitled to consider Hall’s extensive experience working in narcotics law enforcement and his opinion that the packaging materials found in Richbow’s trash were used for cocaine. Further, the test for probable cause is not whether evidence found and described in the affidavit can be explained as having a lawful purpose, as the circuit court implied. If it were, that analysis would subsume the totality of the circumstances analysis, which clearly applies.⁹ We

⁶ Emphasis added.

⁷ See *People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992).

⁸ See *Ulman*, *supra* at 510 and *Stumpf*, *supra* at 223, both citing *People v Harris*, 191 Mich App 422, 425-426; 479 NW2d 6 (1991).

⁹ See *People v Nunez*, 242 Mich App 610, 619-620; 619 NW2d 550 (2000).

observe that many items, such as scales, cash, and plastic bags, have perfectly innocuous purposes but are, nevertheless, an integral part of the drug trade.¹⁰ Moreover, contrary to the circuit court's conclusion, the letter and telegram were important not just because they linked Richbow to the house the police asked to search, which SOIs #2 and 3 noted and the police confirmed as his residence, but because they were in the garbage with this alleged cocaine packaging material. In other words, the letter and telegram made it clear that this garbage, including the alleged cocaine packaging material, likely belonged to Richbow and came from the place the police wanted to search,¹¹ which was a fundamental aspect of probable cause for the warrant.

The information in Hall's affidavit fell short of proving that Richbow was dealing drugs out of his home or otherwise kept his drugs and related contraband there. However, "[t]o provide adequate support for a warrant, the affidavit need not prove anything."¹² Viewed in a "'commonsense'" fashion,¹³ "a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause."¹⁴

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White

/s/ William C. Whitbeck

/s/ Donald E. Holbrook, Jr.

¹⁰ See, generally, *People v Konrad*, 449 Mich 263, 267; 536 NW2d 517 (1995).

¹¹ See *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000).

¹² *People v Whitfield*, 461 Mich 441, 445; 607 NW2d 61 (2000).

¹³ *Russo*, *supra* at 604, quoting *Illinois v Gates*, 462 US 213, 236-237; 103 S Ct 2317; 76 L Ed 2d 527 (1983) (citations within *Gates* omitted in *Russo*).

¹⁴ *Id.* at 603.